

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS**

**FOR THE COMMISSIONER OF VETERANS AFFAIRS**

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Raymond A. Cota,  
Kenneth O. Glidden, and  
Ernest J. Tindell,  
Petitioners,

v

Beltrami County,  
Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

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The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 2 and 3, 2003, at the Beltrami County Courthouse, 619 Beltrami Avenue NW, Bemidji, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated July 31, 2003.

Petitioner Kenneth O. Glidden, 16 Lonnie Court NE, Bemidji, Minnesota 56601, appeared on his own behalf. Darrell Carter, Attorney at Law, appeared at the hearing and provided assistance to Glidden. Petitioner Ernest Tindell, 24524 One Mile Road NE, Black Duck, Minnesota 56630, appeared on his own behalf. Timothy Faver, Beltrami County Attorney, 619 Beltrami Avenue NW, Suite 40, Bemidji, Minnesota 56601, appeared on behalf of the Beltrami County ("the County"). The hearing record closed on October 3, 2003, upon the conclusion of the hearing in this matter.

At the hearing, Raymond Cota withdrew his Petition for Relief under the Veterans Preference Act, because he is still working for the County.

**NOTICE**

This Report is a recommendation, **not** a final decision. The Commissioner of Veteran's Affairs will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Jeffrey L. Olson, Minnesota Department of Veterans Affairs, 206C Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155 to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **STATEMENT OF ISSUE**

The issue to be determined in this proceeding is whether the County abolished Petitioners' positions in good faith within the meaning of Minn. Stat. §197.46.

## **FINDINGS OF FACT**

1. Kenneth Glidden, served twenty years in the U.S. Navy, most recently on active duty from June 23, 1978 to February 28, 1983. He received an honorable discharge.<sup>[1]</sup>

2. Ernest Tindell served in the U.S. Army on active duty from February 25, 1969 to February 19, 1971. He received an honorable discharge.<sup>[2]</sup>

3. Sentence to Service (STS) is a partnership between the Minnesota Department of Corrections ("DOC") and the County. DOC has STS partnerships with many counties in Minnesota. The partnership arrangement allows the county to have the lead role or DOC to have that role. A number of STS programs in other counties in the area have DOC taking the lead role. In approximately 1986, the County entered into an STS partnership with the County taking the lead role.

4. In STS, jail inmates perform tasks in the community and receive reductions in their sentences in relation to time spent working in the program. The entities eligible for STS services are government and nonprofit agencies. Individuals who are referred through a nonprofit can also receive STS services. The costs of STS are evenly divided between the County and the State. All three Petitioners worked in STS. Glidden was the Alternative Sentencing Coordinator, responsible for budgeting and direct oversight of the program. He worked with the program for fifteen years. Cota and Tindell were crew chiefs, responsible for assembling work crews of inmates and arranging for transportation and oversight while the inmates were working on STS projects.

5. Keith Winger was elected Beltrami County Sheriff in 1998. After assuming office, Sheriff Winger transferred responsibility for STS from under the supervision of the Jail Administrator and assumed direct oversight of the program.

6. Sheriff Winger received complaints over the past three or four years about STS. Primarily these complaints related to work not being performed and telephone

calls to Glidden not being returned. Specific complaints identified by Sheriff Winger related to work not done on the park maintenance agreement with the City of Blackduck, difficulties in painting the fire hall in Bemidji, and failing to complete the painting of the Law Enforcement Center foyer.<sup>[3]</sup> Sheriff Winger described these complaints as making difficult the projection of a positive image for the Sheriff's Office.

7. The County Administrator, Tony Murphy, had a discussion of the STS program with the County Board in April 2002. Various criticisms of the program were discussed at the meeting, with input from both Murphy and Board members.

8. In May 2002, one County Board member sent out a newsletter to constituents of his district. Among the items in the newsletter was the following:

**Review of Sentence to Serve Program.** The administrator believes that this program has built its own little empire outside of normal county operations. While they technically report to the sheriff, he actually exercises very little oversight. Murphy observes that relations between STS and county corrections is dysfunctional at best. He wants a thorough review of finances, operations, staffing, and management of the STS program, and plans to complete an independent review by the end of the year.<sup>[4]</sup>

9. In response to the newsletter item, a meeting was held between Sheriff Winger, Glidden, and Murphy. At the meeting, Murphy acknowledged that he had not conducted interviews with either Sheriff Winger or Glidden before discussing STS with the County Board.

10. Sheriff Winger identified problems in the way that STS was being run, such as inmates being returned to the jail by municipal employees and left outside the jail without supervision. Small crew sizes were identified as a problem. Work not being performed in a timely fashion was a complaint made about STS. The lack of opportunities for female inmates was another concern that was expressed. A complaint made about the program was that credit was being given for "windshield time" as inmates traveled to and from STS jobs in STS vehicles.<sup>[5]</sup>

11. Sheriff Winger felt that Glidden was not giving him full cooperation in running the STS program. Based on problems and dissatisfaction reported, Sheriff Winger concluded that Glidden was not effective in supervising STS and decided to change the program to that of a DOC-run partnership.

12. In December 2002, Sheriff Winger spoke to the DOC STS supervisor, Dennis Drury, about the possibility of changing the basis for partnership to have the DOC run the County's STS program.

13. On January 3, 2003, County Administrator Tony Murphy sent a confidential memorandum to the County Board and Sheriff Winger. Murphy indicated that perceived deficiencies of the program needed to be corrected. Regarding individual staff and addressing the ongoing STS function, Murphy's memorandum states:

I understand that an STS crew leader is currently conducting the alcohol and electronic monitoring programs. These jail diversion programs have been pretty successful and I have heard good reports related to the county employee who currently oversees those programs. I suggest that the employee position and the alcohol/electronic monitoring programs to be reassigned to the jail administration. We can equip an office in the county jail for the program and continue to move that valuable service forward. I'd like to proceed with that reassignment before the end of January 2003.

\* \* \*

For a variety of reasons, I am convinced that the state can currently do a better job of administering STS than the county. Although, (sic) we wouldn't be making the change as a budget saving measure, a state takeover of STS will not cost us any more than we are currently budgeting...<sup>[6]</sup>

14. On January 10, 2003, Bob Exner, a Corrections Team Leader, had his temporary assignment to STS terminated by Sheriff Winger.<sup>[7]</sup> Exner resumed his former position in the jail on January 15, 2003.

15. On January 10, 2003, Scott Degelder, an STS crew chief, was reassigned to the County Jail by Sheriff Winger.<sup>[8]</sup> In addition to his duties as crew chief, Degelder performed drug testing and monitoring in the STS program. Degelder continued to perform these tasks under the new arrangement. The space to be used for the new assignment was the old STS space in the County jail.<sup>[9]</sup> The effective date of the change was February 1, 2003.<sup>[10]</sup>

16. On February 4, 2003, the County Board authorized Sheriff Winger to issue layoff notices to the remaining STS staff.<sup>[11]</sup> Sheriff Winger told the County Board that turning the STS program over to the DOC would result in a more effectively run program. The Board members asked no questions of Sheriff Winger at the meeting before approving the issuance of layoff notices.

17. Layoff notices were issued to Glidden, Cota, and Tindell. The notices indicated that they would be laid off effective July 1, 2003. On March 20, 2003, Sheriff Winger wrote Tindell to inquire if he was considering retirement or whether he was seeking reinstatement as a corrections officer, should the State assume control of STS.<sup>[12]</sup>

18. All three of the employees receiving layoff notices were veterans. All three requested a veterans panel hearing. No panel hearing was provided by the County to any of the veterans.

19. In May 2003, Beltrami County Attorney Timothy Faver met with the three veterans. They were informed that there were no "bumping rights" that they could exercise to retain County employment. One position in the Home Monitoring Department of the jail was expected to open. Cota was qualified to apply for that position and he was told that "you [Cota] would be a very strong candidate for the position."<sup>[13]</sup> Cota was not guaranteed employment in the jail.<sup>[14]</sup> Faver told the

employees that they were not entitled to a veterans panel hearing, since their positions were being abolished in a good faith reorganization.

20. The County was informed that the DOC could take over the partnership. On June 3, 2003, the County Board approved the new STS contract.<sup>[15]</sup>

21. Glidden and Tindell were laid off from the County on July 1, 2003. On July 3, 2003, Glidden and Tindell each filed a petition with the Department of Veterans Affairs alleging that his position was not eliminated in good faith. Glidden requested that the relief granted include “‘good faith’ negotiations for a discharge (early retirement) settlement from Beltrami County.”<sup>[16]</sup> Tindell requested that the relief granted include “‘monthly compensation and family insurance until eligible for full retirement ....’”<sup>[17]</sup>

22. Cota received an extension on his layoff notice and his employment was continued to August 1, 2003. On July 28, 2003, Sheriff Winger wrote to Cota, stating:

It appeared that the County Board had a favorable impression of adding an additional employee in the electronic monitoring department of the Sheriff's Office. In addition to that, we are currently posting for a casual bailiff. We are short personnel in that department and are in need of persons to transport prisoners. I'm extending your layoff date from August 1<sup>st</sup> to such time as a final decision is made on the electronic monitoring position and the vacancies in the bailiff department are filled. It is likely that the posting for the monitoring position will be done internally, and you will need to apply and compete for that position. If you are not successful in obtaining that position, there will likely be an opening created somewhere by the person taking that and you should apply for the current opening.<sup>[18]</sup>

23. Glidden and Tindell were not informed by the County of the electronic monitoring or casual bailiff opportunities. Cota applied for, and was hired into, the electronic monitoring position.

24. When the DOC took over STS, one crew leader was hired on an emergency basis. Later, two other crew leaders were hired by DOC from the lists of eligibles maintained by the State.

25. Murphy concluded that the STS change saved the County approximately \$18,603.24.<sup>[19]</sup> The sole source of the savings identified by Murphy is the elimination of the salary cost incurred by the County in funding Glidden's position.<sup>[20]</sup> Murphy's calculation did not consider the fiscal impact of the staffing changes that removed Degelder from STS for almost all of 2002.

26. Glidden identified the total cost incurred by the County in 2002 for the STS as \$77,320.82.<sup>[21]</sup> This calculation begins with the total identified expenses attributed to the STS program for 2002 of \$232,039.44. From that total, Glidden subtracts one-half the salary of Delgelder, and the costs of the service agreement and drug testing. From that total (\$187,650.07), Glidden subtracted the DOC reimbursement of \$110,329.25, to arrive at the actual County cost of \$77,320.82 for 2002. In comparison, the new

contract has the County paying \$97,500.00 to the DOC for operation of the STS program.

27. When STS was operated by the County, the County controlled the project selection process. Fewer than half of the projects performed were for state agencies. Under DOC policies, the DOC now requires that half of the STS projects be State-related projects.

28. Inmates participating in the STS program (after July 1, 2003) are credited with “windshield time” when traveling to and from projects.

29. When STS was operated by the County, inmates were receiving one day of reduction on their sentences for each six days worked. After responsibility for STS was transferred to the DOC, that ratio was changed to one day of reduction for each day worked. The current status of STS is in “limbo” due to a disagreement between the sentencing judges and the DOC director of the STS program as to the appropriate level of sentence reduction. As of the date of the hearing, Sheriff Winger could not affirmatively state whether any inmate was obtaining credit in the STS program.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. The parties received proper notice of the issues in this proceeding and this matter is, therefore, properly before the Administrative Law Judge.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Glidden and Tindell are honorably discharged veteran within the meaning of Minn. Stat. §§197.46 and 197.447 of the Veterans Preference Act.

5. Minn. Stat. §197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

6. Public employers may abolish positions held by veterans notwithstanding the Veterans Preference Act if the abolition of the position is in good faith.<sup>[22]</sup>

7. The burden of proof is upon the veteran to prove by a preponderance of the evidence that he was removed from public employment without a hearing. Once a removal is established, the burden of proof is upon the Employer to prove by a preponderance of the evidence that the veteran’s position was abolished in good faith.<sup>[23]</sup>

8. Glidden and Tindell were removed from their positions with the County within the meaning of Minn. Stat. §197.46.

9. The removal of Glidden and Tindell was for reasons of incompetency or misconduct as those terms are defined by Minn. Stat. §197.46.

10. The removal of Glidden and Tindell from their positions was not the result of the County's good faith decision to abolish those positions.

11. Glidden's and Tindell's veterans preference rights under Minn. Stat. § 197.46 were violated by the Respondent because the County's decision to change the arrangement with the DOC regarding the Sentence to Serve program was an effort to accomplish removal of Glidden and Tindell and not the result of a good faith decision by the County.

12. The County has not provided Glidden and Tindell with the procedural and substantive rights to which they are entitled under Minn. Stat. §197.46.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that the Petitions of Kenneth Glidden and Ernest Tindell be GRANTED, that Kenneth Glidden and Ernest Tindell be reinstated to employment with the County with salary and benefits equal to that which they were receiving as of June 30, 2003, and that back pay be awarded to the date of removal.

IT IS FURTHER RECOMMENDED that the Petition of Raymond Cota be dismissed without prejudice based on the withdrawal of his Petition.

Dated this 23<sup>rd</sup> day of October, 2003.

s/Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Taped - Six Cassettes  
No Transcript Prepared

## MEMORANDUM

This proceeding arises out of the Veterans' Preference Act (VPA or Act), Minn. Stat. § 197.46. Petitioners allege that the County violated the Act, as a matter of law and fact, when Glidden was laid off from his employment as the Alternative Sentencing Coordinator and Tindell was laid off a crew leader with the STS program.

Minn. Stat. § 197.46 governs a veteran's removal from employment with a city or other public employer. With respect to removals, it states, in part, as follows:

No person holding a position by appointment or employment in the several . . . cities . . . in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

The courts have held that the statute does not apply to the good faith abolition of a position held by a veteran. In ***State ex rel. Boyd v. Matson***, 155 Minn. 137, 141-142, 193 N.W. 30, 32 (1923) the court discussed this exception to the statute stating:

The purpose of this section [the Veterans' Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veterans' preference act.

In ***Young***, the Minnesota Supreme Court elaborated on the good faith exception to the Act stating:

If the City merely assigned Young's duties to nonveteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans' Preference Act is applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the Act exists for such situations. Thus, veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which



they are qualified if the public employer continues to need such duties performed. \* \* \*<sup>[24]</sup>

Petitioners argue that their removals were in bad faith. All of the duties of the STS program continue to be performed, merely under DOC administration. In **Young**, the Minnesota Supreme Court said:

[W]e have consistently held that a veteran is entitled to a writ of mandamus ordering the public employer to reinstate the veteran to his or her former position with back pay when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to some other employee.<sup>[25]</sup>

The County maintains that its decision regarding the STS program is rooted in the need to have improved results in the operation of the STS program.

In most cases involving the bad faith abolition of a veteran's position, "it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment of a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished."<sup>[26]</sup> While Petitioner's position has not been re-created by the County under a different name, the transfer of responsibility to the DOC has the effect of re-creating Petitioner's position under the DOC umbrella.

Cost savings can support a finding of good faith in the abolition of a veteran's position.<sup>[27]</sup> In such cases, the cost savings have been found to be the motivation for abolishing the veteran's position.<sup>[28]</sup> In this matter, the County expressly stated that cost savings were not necessarily expected when the decision to abolish the position was made by the County.<sup>[29]</sup> As discussed in the Findings, there were no cost savings derived from the personnel changes that accompanied the transfer of STS responsibility to the State. The perception of cost savings anticipated through the elimination of Petitioner's position was not the reason for the change and therefore the perception of cost savings does not support a finding of good faith in the County's abolition of Petitioner's position.

Three factors have been identified as relevant in determining whether the VPA has been violated in abolishing a position. First, whether the reasons for termination articulated by the employer have a legitimate, factual basis; second, whether the job duties previously performed by the veteran remain to be performed or are being performed by others; and third, whether the methodology used to lay off the veteran was objective and free from manipulation.<sup>[30]</sup>

The evidence introduced at the hearing demonstrates that the County was attempting to change the results obtained from the STS program by transferring responsibility for the program to the DOC. All of the results identified as problems in STS are matters of job performance by Glidden. No apparent effort was made to obtain the desired results by increasing managerial involvement in the program, disciplining

Glidden, or establishing benchmarks for performance. Instead, the County transferred STS to DOC responsibility and laid off Glidden and Tindell.

The outcomes obtained by transferring operation of STS to the State have been contrary to those preferred by the County. Windshield time, identified as a problem before the change, is still credited to inmates. The ratio of days worked to days of credit has drastically changed (from six days worked to one day credit, the ratio changed to one to one). The change in ratio has introduced great uncertainty into ongoing participation by sentencing judges. Control over project selection and timing is no longer held by the County. The County has lost the ability to accomplish meaningful managerial oversight of the program by turning over that responsibility to the DOC.

There is no evidence that Petitioners' duties are not being performed. Both Glidden's and Tindell's former duties are now performed by DOC employees.

The County's methodology in abolishing Petitioner's position is also suspect. When the transfer of STS was first considered by the Sheriff and County Administrator, two STS employees were transferred to positions in the jail. Only three employees (Glidden, Tindell, and Cota) were given layoff notices. Tindell was thought to be nearing retirement and Sheriff Winger inquired regarding his plans.<sup>[31]</sup> Cota was steered toward a position in the jail that fortuitously opened when Petitioners were laid off. Glidden was not informed of any openings. Of the five county employees identified as working in the STS program (Petitioner, Degelder, Cota, Exner, and Tindell), only Glidden and Tindell were involuntarily terminated from County employment.

The "legitimate reason" advanced by the County for changing STS is the objection to the manner in which Glidden was running the program. This is a performance issue. It is an issue of incompetence or misconduct appropriate for resolution by a veterans hearing panel. The duties of the Petitioners continue to be performed. Taking into consideration the period of prior planning and shifting of staff dating from January 2003, the County's conduct supports a conclusion that the changes to the STS program were manipulated to remove veterans from their positions. Applying these factors to the abolition of Petitioner's position, the record shows that the County removed Petitioners from their positions without demonstrating either incompetency or misconduct as required under the VPA.

Because the County acted in bad faith to abolish Petitioners' positions, the County cannot claim the good faith exemption from the VPA. Glidden and Tindell were each entitled to a hearing panel and that right was denied to them. The County must reinstate Petitioners with full back pay and benefits. Glidden requested that the County engage in good faith negotiation of an early retirement settlement. Such conduct is difficult to compel. Reinstatement is the appropriate remedy, after which the parties can determine what course to follow.

**S.M.M.**

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- [1] Notice of Petition and Order for Hearing (attached forms DD-214); stipulation of the parties.
- [2] Notice of Petition and Order for Hearing (attached forms DD-214); stipulation of the parties.
- [3] The ALJ has not considered the merits of any of these complaints. The Finding merely recounts the reasons given by Sheriff Winger for his subsequent actions.
- [4] Exhibit 10, at 2.
- [5] The ALJ has not considered the merits of any of these complaints.
- [6] Exhibit 9.
- [7] Exhibit 17.
- [8] Exhibit 16.
- [9] *Id.* Due to space considerations, STS was being operated out of a building at the County fairgrounds.
- [10] *Id.*
- [11] Exhibit 18.
- [12] Exhibit 21.
- [13] Exhibit 4.
- [14] *Id.*
- [15] Exhibit 26.
- [16] Glidden Petition for Relief, at 2.
- [17] Tindell Petition for Relief, at 2.
- [18] Exhibit 14.
- [19] Exhibit 7.
- [20] The DOC funded the other half of Petitioner's salary.
- [21] Exhibit 20.
- [22] ***Young v. City of Duluth***, 386 N.W.2d 732, 738 (Minn. 1986).
- [23] Minn. R. 1400.7300, subp. 5 (1999); ***Holmes v. Board of Commissioners of Wabasha County***, 402 N.W.2d 642 (Minn. App. 1987).
- [24] ***Young v. City of Duluth***, 386 N.W.2d 732, 738-39 (Minn. 1986).
- [25] ***Young***, 386 N.W.2d 732, 738.
- [26] ***State ex rel. Niemi v. Thomas***, 223 Minn. 435, 438-39, 27 N.W.2d 155, 158 (1947).
- [27] ***Taylor v. City of New London***, 536 N.W.2d 901 (Minn. App. 1995), *rev. denied* (Minn. Oct. 27, 1995).
- [28] ***Taylor***, 536 N.W.2d at 904. See also ***McGlynn v. City of Fosston***, OAH Docket No. 12-3100-13171-2 (Findings of Fact, Conclusions and Recommendation issued January 18, 2001).
- [29] Exhibits 8 and 9.
- [30] ***Gorecki v. Ramsey County***, 437 N.W.2d 646 (Minn. 1989); ***Ochocki v. Dakota County Sheriff's Department***, 464 N.W.2d 496 (Minn. 1991); ***State ex rel. Evens v. City of Duluth***, 195 Minn. 563, 262 N.W.2d 681 (1935).
- [31] Exhibit 21.